AUG 16 1961

JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1960

No. 324

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

Petition for Writ of Certiorari

To the Appellate Court of Illinois, First District

HARLAN L. HACKBERT,
208 S. LaSalle Street
Chicago 4, Illinois
Attorney for Petitioner.

CHICAGO LAW PRINTING CORP., 189 W. MADISON, CHICAGO FRanklin 2-6521

INDEX

PAGE

Petition for Writ of Certiorari 1

Opinion Below 2

Jurisdiction 2

The Questions Presented For Review 2

Reasons for Allowance of the Writ 3

Statute Involved 4

Statement of the Case 6

Argument 10

I. Submission of the Charge of Failure to Provide a "Safe Place to Work" as an Independent Ground of Liability in a Peremptory Instruction is contrary to this Court's Holding in Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 10

II. An instruction That Plaintiff's "Did not assume the risks of their employment" deprived the Defendant of the Partial Defense of Plaintiffs' contributory Negligence and the Principle of Comparative Negligence, contrary to this court's holding in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 14

Appendix 1A

Opinion of the Appellate Court 10A

Judgment Order of Appellate Court 11A

Judgment Order of Illinois Supreme Court .. 13A

TABLE OF CASES

PAGE

Chicago & N. W. Ry. Co. v. Garwood (C.C.A. 8), 167 F. 2d 848 13

Ellis v. Union Pacific R. Co., 184 Neb. 515, 27 N.W. 2d 921 17

Ellis v. Union Pacific R. Co., 329 U.S. 649 17

Erie R. Co. v. Purucker, 244 Ill. 320 .....3, 15

Fisher v. Chicago & N. W. Ry. Co., 290 Ill. 49, 58 13

Keefe v. Armour & Co., 258 Ill. 28, 34, 35 13

Larsen v. Chicago & N. W. Ry. Co. (C.A. 7) 171 F. 2d 841 19

McCray v. Illinois Central R. Co., 12 Ill. App. 2d 425 13

Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 ....3, 10

Nickell v. Baltimore & O. R. Co., 347 Ill. App. 202, 209 19

Nordhaus v. Vandalia R. Co., 242 Ill. 166 13

Peterson v. Oak Park El. R. Co., 260 Ill. 280, 283 13

Petrowski v. New York, C. & St. L. Ry. Co., 4 Ill. 2d 125 13

Potter v. Brittan (C.A. 3) 286 F. 2d 521, 523 .....4, 15, 16

Seaboard Airline Ry. v. Horton, 233 U.S. 492, 503 ....3, 15

Seaboldt v. Pennsylvania R. Co. (C.A. 3) 290 F. 2d 296 17

Starek v. Chicago & N. W. Ry. Co., 4 Ill. 2d 611 12

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 .....4, 14

Wantland v. Illinois Central R. Co. (C.A. 7) 237 F. 2d 921, 926 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1960

No.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,
Respondents.

Petition for Writ of Certiorari

To the Appellate Court of Illinois, First District

Your petitioner prays that a writ of certiorari issue to review the judgment and decision of the Appellate Court of Illinois for the First District, First Division, affirming judgments of the Circuit Court of Cook County, Illinois, in favor of the plaintiffs in an action under the Federal Employer's Liability Act. (45 U.S.C. § 51, *et seq.*)

OPINION BELOW

The opinion of the Appellate Court of Illinois is reported in abstract form as *Borrero* v. *Elgin, J. & E. Ry. Co.*, 28 Ill. App. 2d 362, and in the syllabus form at 171 N.E. 2d 673. The opinion in full is printed as an appendix to this petition for writ of certiorari.

JURISDICTION

The judgment and order of the Appellate Court affirming the judgments below was entered December 29, 1960. A petition for rehearing was denied February 9, 1961. A petition for leave to appeal from the judgment of the Appellate Court was denied by the Supreme Court of Illinois on May 18, 1961, thus making the judgment of the Appellate Court final for the purpose of further review in this court. *Minneapolis etc. Ry. Co.* v. *Rock*, 279 U.S. 410.

This petition is filed within ninety days from the denial of the petition for leave to appeal. The jurisdiction of this court to review the judgment of the Appellate Court is invoked under Title 28 U.S.C. Sections 125(3) and 2101(c).

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents for review two questions which constantly recur in the trial of Federal Employer's Liability Act cases and are of importance in the proper administration of the Act. Both questions arise on instructions given to the jury at the request of the plaintiffs over defendant's specific objections. The questions are:

1. Was it reversible error to submit to the jury as an independent ground of liability in a peremptory

instruction, a charge of failing to provide a reasonably safe place to work when the bridge on which plaintiffs were injured was physically safe as a temporary way to leave their place of work and was hazardous only because of alleged active negligence in the operation of its train?

2. Was it prejudicial error to instruct the jury that plaintiffs did not "assume the risks" of their employment when the defense of assumption of risk was not raised by pleading or argument, and thereby adversely affecting the defense of contributory negligence under 45 U.S.C. § 53 and the doctrine of comparative negligence under *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54? Was defendant's contention "that the sole cause of plaintiffs' injuries was the carelessness of the plaintiffs themselves and that they failed to meet the test of the conduct of reasonable men * * * the defense of assumed risk by changing its name to contributory negligence?"

REASONS FOR ALLOWANCE OF THE WRIT

As its reasons for the allowance of the writ, petitioner respectfully urges:

1. The Appellate Court of Illinois has decided of the first question presented in a way probably in conflict with this Court's decision in *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325.

2. The Appellate Court of Illinois has decided the second question presented in a way which:

   a. Fails to give effect to the distinctions between the defenses of assumption of risk and of contributory negligence as defined in this Court's decisions in *Seaboard Air Line Ry.* v. *Horton*, 233 U.S. 492, 503 and *Erie R. Co.* v. *Purucker*, 244

U.S. 320, and in such decisions as *Potter* v. *Brittan* (C.A. 3), 286 F. 2d 521, 523;

b. Prejudices the defense of contributory negligence as permitted under the Act (45 U.S.C. § 53); and

c. Raises the false issue of assumption of risk rather than the controlling principle of comparative negligence, contrary to this Court's decision in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54.

STATUTE INVOLVED

The only statute involved is the Federal Employer's Liability Act, Title 45 U.S.C., §§ 51, 53 and 54.

Section 1 of the Act (45 U.S.C. § 51) so far as pertinent here provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . track, road bed . . . or other equipment."

Section 3 of the Act (U.S.C., § 53) so far as pertinent here provides as follows:

> "In all actions . . . under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . "

Section 4 of the Act (45 U.S.C., § 54) so far as pertinent here provides as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . "

STATEMENT OF THE CASE

This is an action under the Federal Employers' Liability Act (45 U.S.C. §51, *et seq.*) to recover damages for injuries sustained by the two plaintiffs, both section laborers, when they were struck by one of two trains on defendant's double-track bridge near Gary, Indiana, on November 19, 1957. There was a trial by court and a jury, which returned verdicts of "$22.000" in favor of plaintiff Borrero, and "$66.000" in favor of plaintiff Gomez (Abst. 6), upon which judgments for $22,000 and $66,000, respectively, were entered (Abst. 6). Defendant's motions after verdict (Abst. 6) were denied (Abst. 12) and this appeal followed.

This accident occurred on November 19, 1957 on defendant's main-line, double-track, double bridge over the tracks of the New York Central and B&O main line tracks, a little more than a mile west* of defendant's Kirk Yard at Gary, Indiana. Defendant's tracks in this area are elevated, passing over the tracks of two other railroads and a public highway south* of the scene of the accident. Immediately north* of the bridge defendant's tracks begin a sharp, 1000-foot long curve to the east* downgrade into Kirk Yard (Abst. 74).

Plaintiffs Raphael Borrero and Jose Gonzales Gomez** were employed by defendant as section laborers, Borrero having worked since November, 1956 (Abst. 37) and Go-

---

* These directions are approximate, but not compass-true.

** This plaintiff is sometimes called "Gonzales" in the testimony. In this brief we shall call him "Gomez."

mez since April, 1957 (Abst. 61). Both men were Puerto Ricans and they and three of their witnesses testified through an interpreter. On the morning of the accident, the crew of about thirty men reported for work at eight o'clock at Kirk Yard, and, with their tools, were transported by bus to a point below and west of the double bridge, north of the New York Central tracks; leaving the bus there, they climbed up onto defendant's right-of-way, and walked south across, and several hundred feet beyond the double bridge, to their place of work for the day (Abst. 18, 19, 20, 26, 37, 38, 41, 44). Their work that day was to complete the track repairs following a derailment; they had been working two to four days in this area (Abst. 20, 21, 23, 61).

Sometime before four o'clock, the foreman, Peter Zakutansky (Abst. 20) left the job with the track motor car and some of the gang, to haul the scrap rails back to Kirk Yard (Abst. 20, 25). He left Romero Chavez, a laborer, in charge of the remainder of the gang because Chavez spoke both Spanish and, as he put it, "more English than everybody." (Abst. 21, 23). About four o'clock, Chavez said "Vamos," which the interpreter translated as "Let's go", and the gang started back for the double bridge and the bus below, walking single file along the tracks, carrying their tools (Abst. 14, 17, 18, 22, 38, 45). Because there was a train standing on one of the tracks below the double bridge, the men did not go down the embankment on the south side of the double bridge, as they otherwise would have done (Abst. 18, 19, 26, 31, 38, 45). Chavez was the last of the group, checking to see that no tools had been left, as their work at this place was completed (Abst. 22, 25, 28).

A 65-car eastbound train was moving over the bridge on the right hand or easternmost track as the men walked

toward the double bridge (Abst. 14, 15, 17, 18, 24, 30, 32, 38, 42, 46, 62). Chavez had warned the men of the approach of this train and they had stepped over to the westbound track to be out of its way (Abst. 22, 25). Most of the crew stayed outside the bridge (Abst. 27), but four of the men started out onto the bridge while the eastbound train was still on the bridge; Valentin was first, followed by Lopez; Gomez and Borrero, the last two men to enter the bridge followed some 60 or 70 feet behind them, walking between the westbound track and the wall of the bridge; and Cruz, the next in line, stepped to the side, south of the bridge, "waiting for the train to get off" (Abst. 14, 16, 17, 19, 25, 27, 30, 32, 38, 42, 45, 46, 57). When Valentin and Lopez were about 20 feet from the north end of the bridge, they saw a westbound train coming from the north around the curve, entering the bridge; Valentin shouted a warning, "Look out, there is a train approaching us," and he and Lopez jumped to the side, and stood safely in the openings between the girders and the floor of the bridge (Abst. 18, 19, 27, 30, 32). Chavez, who was five or six hundred feet south of the bridge, shouted a warning, but the men on the bridge were apparently too far away to hear him (Abst. 22, 25, 26). Borrero and Gomez, who were 60 to 70 feet behind Valentin and Lopez, did not hear the warnings and they neither saw nor heard the approaching train before it struck them and, of course, neither made any effort to get out of the way (Abst. 39, 42, 57, 62). Each testified that as he was walking across the bridge, he was "looking down and looking up" (Abst. 42, 57, 62). Plaintiffs' witnesses estimated the speed of the train at 25 to 35 miles per hour (Abst. 15, 22).

Harry Sprinkle, the engineer of the train, testified the speed shown on the engine speedometer was 15 miles an hour (Abst. 74). Approaching the curve and the bridge, he was standing in the engineer's position on the right side

of the cab (Abst. 74). Because of the hood of the engine ahead of the cab, he could not see to the left ahead of the engine, and rounding the curve, he could not see any part of the bridge until the front end of the locomotive was within 25 or 30 feet of the bridge, and he could not see the length of the bridge until the engine had straightened out on the bridge (Abst. 74, 76-77). The running board of the locomotive prevented his seeing the ground and tracks in front of the locomotive for a distance of 100 feet (Abst. 79-80) (Abst. 77). The train could not be stopped in less than 300 feet. It was not customary to sound the whistle or give other warning when rounding curves in the open country or approaching a bridge (Abst. 79) and no such warning was given this day. Sprinkle did not see any of the men on the bridge, and did not know his engine had struck plaintiffs until later that evening (Abst. 78-79, 84).

The questions as to the proper construction of the Act presented by the challenged instructions were raised in the trial court by objections to the instructions (Abst. 108, 109) at the conference on instructions prior to argument to the jury as required by §67(c) of the Illinois Civil Practice Act (Ill. Rev. Stat., 1959, ch. 110, §67(c)). The instructions were given over such objections (Abst. 116). The contentions were renewed in defendant's motions after verdict (Abst. 9-10) in accordance with §68.1(2) (Ill. Rev. Stat., ch. 110, §68.1(1)). The motions were denied (Abst. 12). Under Illinois appellate practice "[n]either an assignment nor a statement of errors is necessary" (Rules of Appellate Court, Rule 7), and the questions were argued in the briefs in accordance with Illinois practice and were considered in the opinion of the Appellate Court (App. p. 5-A-7-A).

ARGUMENT.

I.

SUBMISSION OF THE CHARGE OF FAILURE TO PROVIDE A "SAFE PLACE TO WORK" AS AN INDEPENDENT GROUND OF LIABILITY IN A PEREMPTORY INSTRUCTION IS CONTRARY TO THIS COURT'S HOLDING IN MICHALIC v. CLEVELAND TANKERS, INC., 364 U.S. 325.

Although plaintiffs' complaint (Abst. 3) contained seven charges of negligence, one of which, discovered peril, was withdrawn at the close of plaintiffs' evidence (Abst. 71), the case was submitted to the jury under a mandatory or peremptory instruction on three grounds of negligence: the jury was instructed to find the defendant guilty if it failed [1] to give the plaintiffs "any notice or warning of the approaching train, or [2] to maintain a proper lookout in the direction of the movement, or [3] to use reasonable care to provide plaintiffs with a reasonably safe place to work . . . " (Abst. 116). Assuming that, as held by the Appellate Court below, there was sufficient evidence to take to the jury the charges of failure to give notice or warning or to maintain a proper look-out, defendant's objection to the peremptory instruction preserves for review the question whether it was error to submit the "safe place to work" charge as an *independent* ground of liability in such a *peremptory* instruction.

We submit that on this issue the decision below is squarely in conflict with this Court's decision in *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, which was cited to the court below on oral argument, but is wholly ignored in its opinion. In *Michalic* all members of this Court

joined in the holding that phrasing the claim of active negligence—in that case supplying a defective wrench—"as a failure to provide a safe place to work" did not entitle plaintiff "to have that claim submitted to the jury as an additional ground of . . . alleged liability." We submit that same conclusion must follow here.

Here the bridge on which plaintiffs were injured was not their "place of work" at all; their work that day in repairing one track of defendant's double-tracked main line had been several hundred feet south of the bridge (Abst. 18, 20, 24, 28, 31); "we did not do any repair work on the bridge itself, or on the tracks on the bridge" (Abst. 24). The men were walking along the elevated right of way back to the bus which would return them to Gary at the end of the day's work; they were using the bridge only because of a train of another railroad on the tracks below, which blocked the ground-level approach to the bus (Abst. 18, 19, 22, 26, 31, 38, 45). It would take the plaintiffs less than a minute to cross the bridge, which the evidence indicates, was about 200 feet long. Such a momentary, unusual use of the bridge as a walkway imposes on the master a less stringent duty than is contained in the "safe place to work" concept.

But assuming that the duty to provide a "safe place to work" includes a safe way to return from work, the evidence here is clear that the bridge was perfectly safe as a route to the bus so long as the men did not try to cross the bridge while there were trains operating on both tracks. Indeed, to an attentive person the bridge was safe even then; Valentin and Lopez, who preceded plaintiffs onto the bridge, saw and heard the approaching west-bound train and moved safely to the side in the space between the girders of the bridge (Abst. 18, 19, 27, 30, 32). The bridge was "unsafe" for the plaintiffs

only if a second train came on the bridge without warning, and without proper look-out and control. The "route to the bus" was perfectly safe, absent active negligence as claimed, in the operation of the west-bound train.

The charges of active negligence—lack of warning and lookout—were sharply disputed. Under these circumstances, to submit the safe place to work charge, independently of the active negligence charges, was clearly prejudicial. Today every state has workmen's compensation laws under which injuries sustained at work are compensable irrespective of fault. Almost every juror is familiar to some extent with the operation of such compensation acts. To a juror's way of thinking, if an employee is hurt on his employer's premises, the "place to work" was not "safe," whether the injury resulted from the condition of the premises or from active negligence in an otherwise safe place, or without any fault. The jurors need not resolve the troublesome questions whether adequate warning was given, or whether all possible lookout was maintained, if all that is required is failure to furnish a "safe place to work." A double-track bridge with trains on both tracks is not a "safe place" for an employee to walk; therefore, the defendant did not provide him with "a safe place to work," and liability follows, regardless of fault.

Starck v. *Chicago & N. W. Ry. Co.*, 4 Ill. 2d 611, from which the challenged instruction was obviously taken, strongly intimates that the omission here of the phrase "in one or more of the respects mentioned" (because of which the question was "not squarely presented" in that case) is fatal here. Other Illinois cases have repeatedly held that the safe place to work rule "imposes 'the duty only of keeping the premises physically safe and has no reference to anything else,' " and "an instruction on that

rule when there is no evidence to establish a violation of such duty is erroneous." *Fisher* v. *Chicago & N. W. Ry. Co.*, 290 Ill. 49, 58; *Keefe* v. *Armour & Co.*, 258 Ill. 28, 34, 35; *Nordhaus* v. *Vandalia R. Co.*, 242 Ill. 166. *Peterson* v. *Oak Park El. R. Co.*, 260 Ill. 280, 283, is squarely in point. *Chicago & N. W. Ry. Co.* v. *Garwood* (C.C.A. 8), 167 F. 2d 848, held it was reversible error to refuse to withdraw the safe place to work issue from the jury in a two-train, double-track accident much like the one here involved. These cases were cited to, but are not distinguished in the opinion of, the court below. That court relied upon *McCray* v. *Illinois Central R. Co.*, 12 Ill. App. 2d 425, where an icy sidewalk made the way from work physically unsafe, and *Petrowski* v. *New York, C. & St. L. Ry. Co.*, 4 Ill. 2d 125, where an industry "dolly" on the unlighted industry tracks made the tracks physically unsafe for switching movements. Neither of these cases even remotely bears upon the question here.

We submit that this Court in the *Michalic* case properly held that where the hard core of plaintiff's case is active negligence, not the condition of the work area, a plaintiff is not entitled to have his case submitted to the jury under the safe place to work rule as an independent ground of liability. That is sound law. The opinion below, ignoring that principle, should not be permitted to erode this Court's holding in *Michalic*.

II.

AN INSTRUCTION THAT PLAINTIFFS "DID NOT ASSUME THE RISKS OF THEIR EMPLOYMENT" DEPRIVED THE DEFENDANT OF THE PARTIAL DEFENSE OF PLAINTIFFS' CONTRIBUTORY NEGLIGENCE AND THE PRINCIPLE OF COMPARATIVE NEGLIGENCE, CONTRARY TO THIS COURT'S HOLDING IN TILLER v. ATLANTIC COAST LINE R. CO., 318 U.S. 54.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, this Court held that by the 1939 amendment to the Act (53 Stat. 1404, 45 U.S.C. §54) Congress "swept into the discard . . . assumption of risk by whatever name it was called" and required "cases tried under the Federal Act to be handled as though no defense of assumption of risk had ever existed" (p. 64). Quoting the report of the Senate Judiciary Committee, this Court held that the amendment "was clearly aimed at making the principles of comparative negligence the guiding rules of decision in accident cases: 'The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.'"

Since the decision in the *Tiller* case, defense counsel in FELA cases have avoided any reference whatever to the forbidden phrases "assumed the risk" or "assumption of risk." But plaintiffs' counsel have ingeniously devised the technique of instructing the jury that assumption of risk is no defense and, under the cloak of this instruction, nullifying the principle of comparative negligence. The instant case is an excellent example of the effective use of this technique.

Defendant did not plead assumption of risk as a defense nor did its counsel argue to the jury that in their course of conduct plaintiffs "assumed any risk" of their employment. But defendant did seek to show by cross-examination of the other members of the crew and plaintiffs themselves that plaintiffs should either have stopped "waiting for the train to get off" before going onto the bridge, as did most of the other members of the crew (Abst. 16, 27), or if they went onto the bridge—as did two other members of the crew, Valentin and Lopez (Abst. 18, 32)—they should have been attentive to observe and avoid the approaching train, as those men were (Abst. 19, 32, 42, 62). This is the defense of comparative negligence: whether the plaintiffs met the standard of the conduct of reasonable men, "reasonable men," under the circumstances being the other members of the crew. This is not "assumption of risk," which is "a matter of knowledge of the danger and intelligent acquiescence in it," not of carelessness. *Potter* v. *Brittan,* (C.A. 3) 286 F. 2d 521, 523, quoting Prosser on Torts (1955) Ch. 10, §55. See also *Seaboard Airline Ry.* v. *Horton,* 233 U.S. 492, 503; *Erie R. Co.* v. *Purucker,* 244 Ill. 320.

Over defendant's specific objection (Abst. 109) the court gave the jury the following instruction (Abst. 116):

> "You are instructed that it is provided by the Federal Employers Liability Act that in any action brought against any common carrier under or by virtue of any of the provisions of said law to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

We submit that the only meaning which the jury could give this instruction was that plaintiffs did not assume any

risk involved in going out on the bridge while one train was already passing over it, in other words, that plaintiffs were wholly relieved of the consequences of any contributory negligence on their part. That was the only "risk" to which plaintiffs exposed themselves which the evidence here disclosed, and the obvious effect of the instruction was to deprive the defendant of the benefit of the limited defense of plaintiffs' contributory negligence.

The Appellate Court below held that the giving of this instruction was not error, saying:

> "Defendant's cross-examination of plaintiffs indicates an effort to show that the sole cause of plaintiffs' injuries was the carelessness of the plaintiffs themselves, and that they failed to meet the test of the conduct of reasonable men. We believe this cross-examination shows an attempt to develop an evidentiary basis for use of the defense of the doctrine of assumed risk by changing its name to contributory negligence."

If an Appellate Court composed of experienced jurists trained in the concept of common law negligence failed to appreciate the distinction between the statutory provision that the "employee shall not be held to have assumed the risks of his employment" and the defense that "the *carelessness* of the plaintiffs themselves . . . failed to meet the test of *the conduct of reasonable men*"[1] it is certain that a jury inexperienced in master and servant law would be confused by the instruction which sets up and then destroys the straw man of assumption of risk." This was precisely the holding in the recent and well considered decision of the Court of Appeals for the Third Circuit in

---

[1] See the scholarly discussion of the distinction in the opinion of Goodrich, Jr., in **Potter v. Brittan** (C.A. 3), 286 F. 2d 521, citing the leading text-writers.

Seaboldt v. *Pennsylvania R. Co.*, (C.A. 3) 290 F. 2d 296. There at the conclusion of the court's "clear and accurate" chare on contributory negligence, plaintiffs' counsel objected on the ground that the charge "was a charge on assumption of risk 'which is not a defense under the statute'" and and under pressure of this objection the court instructed the jury "I want to say to you that this plaintiff does not assume any risk of his employment. The doctrine of assumption of risks has been abolished. There is no assumption of risk in his employment" and plaintiffs' counsel then stated to the jury "In other words, he does not assume any risk or assume that anybody else is going to be negligent to him." The Court in an opinion by Goodrich, J., a distinguished legal scholar in the field of negligence law, said:

> "It was unfortunate to bring in this business of assumption of risk at this stage of the case. No one had mentioned it either in pleadings, arguments, testimony or written documents. No one would have thought of it. Plaintiff's counsel's objection to the judge's charge is not well taken. The line between contributory negligece and assumption of risk is a difficult one to draw. This Court has recently had occasion to discuss it and to point out that fact. *Potter* v. *Brittan*, 1961, 286 F. 2d 521.
>
> "It seems very clear in reading this record afterward that for this difficult concept to be thrown into the jury's mind at the last minute without much explanation was almost sure to have left it in confusion. The case had been hard fought. The charge of the judge had presented the problems clearly and this new matter coming in at the end was enough to confuse the most conscientious jury."

Another well considered case is *Ellis* v. *Union Pacific R. Co.*, 184 Neb. 515, 27 N.W. 2d 921, where on remandment after this court's decision in *Ellis* v. *Union Pacific R.*

Co., 329 U.S. 649, the Nebraska court said of a similar instruction:

> "Assumption of risk is an affirmative defense. In the case at bar it was not made an issue either by the pleadings or the evidence. Therefore, it had no relation to the issues in the case and should not have been given. On the other hand, in its form and substance as given, it could have no other effect except to have confused and misled the jury by inducing the erroneous inference that defendant was an insurer against all risks of plaintiff's employment, regardless of their character or genesis. In effect, it was the equivalent of a direction for plaintiff."

The court then referred to the statute and continued:

> "* * * Rather, without question the instruction clearly inferred that plaintiff could not be found to be negligent, thereby in fact superseding and conflicting with the instructions theretofore given on negligence and contributory negligence.
>
> "The suggestion therein that the instruction was not intended to conflict with the instructions on the subject (*sic*) of negligence' certainly could not cure its erroneous character. It would be expecting too much of ordinary lay jurors to assume that they could or would intelligently and correctly apply such an instruction when some courts seemingly still have differences of opinion concerning the proper application of the doctrine of assumption of risk in such cases."

We submit that these cases reach the proper conclusion, and that the decision below, approving the strategic technique which negates the limited defense of contributory negligence permitted by the statute, and the principle of comparative negligence by which this Court has held in *Tiller* that these cases should be tried, should be reviewed and the strategy condemned once and for all by this Court.

This is not an isolated instance, a minor error not likely to be repeated. This is an ever-recurring problem in the trial of FELA cases,[2] an almost sure-fire method of preventing any successful reliance by the defendant on its partial defense of contributory negligence and the principle of comparative negligence. In the proper submission of these issues for jury determination, it is imperative that defendants be not deprived of the principle of comparative negligence by calling contributory negligence "assumption of risk."

To try an FELA case "as though the doctrine of assumption of risk nad never existed" (*Tiller, supra,* p. 64) means that *neither plaintiff nor defendant* may properly refer to the doctrine for *any* purpose. The controlling issue of comparative negligence (*Tiller, supra,* p. 65) must be decided by the jury without any reference to "risks of his employment" due to negligence, which the employee does not assume; the issue for the jury is "to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." (*Tiller, supra,* p. 65) The mere mention of "assumption of risk" can only confuse the jury. Even in its heyday, the phrase was, at the very least, confusing to the bench and bar. Today, with FELA

---

[2] In Chicago, Illinois, probably the leading forum for trial of FELA cases, the instruction is given in virtually every case today. See Illinois Pattern Jury Instructions (1961), §160.09. The practice stems from the opinion in **Nickell v. Baltimore & O. R. Co.**, 347 Ill. App. 202, 209, cited as authority for such an instruction in Hemphill's Illinois Jury Instructions (1959 Pocket Part) §2600. The instruction has had only the most cursory consideration in **Wantland v. Illinois Central R. Co.** (C.A. 7), 237 F. 2d 921, 926; **Larsen v. Chicago & N.W. Ry. Co.** (C.A. 7), 171 F. 2d 841, 846; and the **Nickell** case.

cases as virtually the only surviving field of master and servant personal injury jury trials, the concept is one wholly without meaning for jurors. On the contrary, "negligence" and "contributory negligence" are the staple fare of accident litigation; laymen generally, and particularly jurors, under proper instructions, readily understand these concepts. To confuse the relatively simple task of comparing defendant's negligence with plaintiff's contributory negligence by injecting the false issue of non-assumption of risk is certain to be prejudicial to the carrier defendant.

This Court granted certiorari in the *Tiller* case to announce the principle that assumption of risk did not survive on behalf of defendants as "non-negligence." We submit that certiorari should be granted here to announce the principle that the false issue of non-assumption of risk does not survive as "non-contributory negligence," and to resolve the growing conflict of opinions with respect to this instruction.

Your petitioner respectfully submits that the substantial questions presented by this petition, and the conflict between the opinion below and the controlling federal decisions, should be resolved by this Court.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

APPENDIX

OPINION OF THE APPELLATE COURT.

MR. JUSTICE MURPHY delivered the opinion of the court.

This is an action under the Federal Employers' Liability Act by two section laborers against defendant, the Elgin, Joliet & Eastern Railway Company, their employer. Defendant appeals from jury verdicts of $22,000 in favor of plaintiff Borrero and $66,000 in favor of plaintiff Gomez.

Plaintiffs were struck by defendant's unscheduled freight train, while walking on defendant's main-line, double-track bridge over N. Y. C. and B. & O. main-line tracks. Defendant's tracks in the area are elevated and also pass over a public highway to the south. The double bridge is a mile west of defendant's Kirk Yard, Gary, Indiana, and is about 200 feet in length. It extends in a northeasterly and southwesterly direction. Its immediate north approach is a sharp 1,000-foot long, upgrade curve from the east.

The plaintiffs are Puerto Ricans and testified through an interpreter. Borrero had worked for defendant as a section laborer since November, 1956, and Gomez since April, 1957. On the morning of November 19, 1957, a crew of about thirty section laborers, which included plaintiffs, was transported in defendant's bus from the Kirk Yard to a ground-level point north and west of the double bridge and north of the N. Y. C. tracks. Leaving defendant's bus, the crew climbed up and onto defendant's right of way, walked south across the bridge and several hundred feet beyond it to the place of work for the day. They had been working in the area south of the bridge for several days, repairing defendant's tracks after a derailment.

In the afternoon, the crew foreman returned to the Kirk Yard and left in charge a laborer, Romero Chavez, who was also the bus driver. At about four o'clock, Chavez

said, "Let's go," and the crew started back to the bus, which had remained parked north of the bridge. It was dark, cloudy and cold. There was a train standing on the tracks beneath the bridge, so they started north to cross the bridge, walking single file and carrying their tools. Chevez was the last of the group, as he was checking to see that all tools were taken along.

As the men walked north toward the bridge, defendant's 65-car eastbound train was moving north over the bridge, on the right-hand or easternmost track. Chavez had warned the men of the approach of this train, and they had stepped over to the westbound track to be out of its way. Four of the men proceeded onto the bridge while the eastbound train was still on it; Valentin was first, followed by Lopez; Gomez and Borrero, the last two men to enter the bridge, followed some 60 or 70 feet behind them, walking between the westbound track and the west wall of the bridge; and Cruz, the next in line, stepped to the side south of the bridge, "waiting for the train to get off." When Valentin and Lopez were about 20 feet from the north end of the bridge, they saw a westbound train coming from the north around the curve and entering the bridge. They jumped to the side and stood safely in the openings between the girders and the floor of the bridge. Borrero and Gomez, 60 to 70 feet behind, were struck by the train, knocked unconscious and injured. They did not see or hear the train, nor did they hear the warning of Chavez, 500 or 600 feet to the south of the bridge, nor the shout of Valentin before he jumped out of its way. Borrero testified, "I was walking forward, looking down, and looking forward at the same time, because I didn't want to fall down. There were stones on the floor and railroad ties." Gomez testified, "I had to look back down again because it was danger underneath. * * * I was looking more down than up, because I was watching the floor."

Plaintiffs' witnesses estimated the train speed to be 25 to 35 miles per hour. The engineer testified that he did not sound the whistle or give any warning as he approached the bridge. He did not see plaintiffs and did not know that he had struck them until later that evening. The engine speedometer showed 15 miles per hour, and the train could not be stopped in less than 300 feet.

Defendant's principal contentions are that the sole cause of plaintiffs' injuries "was the carelessness of the plaintiffs themselves"; that "there was no evidence to sustain any of the charges of negligence upon which the case was submitted to the jury; that the court erred in instructing the jury; and the verdict are excessive." Three charges of negligence were submitted to the jury: failure to give notice or warning of the approaching train; failure to maintain a proper lookout; and failure to furnish a safe place to work.

Defendant admits that the engineer gave no warning and argues, in the absence of statute or rule, none was required, because there was no reason to anticipate that anyone would be on the bridge while another train was passing over it; that plaintiffs "were in a hurry to get to the bus"; and that the train on the track below, which "blocked the normal way of going down the embankment south of the bridge," was not the responsibility of the defendant, nor visible to the engineer. Defendant contends there was sufficient notice or warning of the approaching train, because Valentin and Lopez both saw it when they were 20 feet from the end of the bridge, and Valentin shouted a warning before they jumped into a place of safety; also, that Chavez, about 600 feet away, shouted a warning "which plaintiffs probably could not hear because of their heavy winter caps."

Defendant concedes "its duty was to exercise reasonable care to provide a reasonably safe passage" to the bus, and states that if the men had waited three or four minutes, the bridge would have been "completely safe" to walk across. Also, that measured by the conduct of their fellow crew members, plaintiffs failed to meet the test of the conduct of reasonable men; that they should have waited until the bridge was clear, as most of the crew members did, or ought to have looked and listened, as Valentin and Lopez did; and, therefore, there was nothing which defendant could do to prevent the occurrence.

The Federal Employers' Liability Act makes a carrier liable in damages for any injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents or employees." The defense of assumption of risk is abolished, and contributory negligence of plaintiffs does not bar a recovery. (45 U.S.C. 51, 54.) It is the duty of a railroad company to furnish its employees with a reasonably safe place to work, "a duty which becomes imperative and exacting as the risk increases." *Larsen* v. *Chicago & N. W. Ry. Co.*, 171 F. 2d 841, 844 (1948).

On appellate review, the basic question is whether there is any evidence, considered in the light most favorable to the plaintiff, that defendant was guilty of negligence which contributed in whole or in part to plaintiff's injury. "Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear." (*Bonnier* v. *C. B. & Q. Ry. Co.*, 2 Ill. 2d 606, 608, 611 (1954).) The Appellate Court's function is exhausted when an evidentiary basis for the jury's verdict becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. *Allendorf* v. *Elgin, J. & E. Ry. Co.*, 8 Ill. 2d 164, 171 (1956).

The parking of the bus in an area where access was limited; and the nature of the available routes to the bus; the hazards of the route taken under the direction of the acting foreman; the care required to walk safely; the visibility and headgear worn; the adequacy of the warning shouts of other crew members; the lack of warning by the engineer and the speed of the engine which struck plaintiffs; and the fact that there was a train on the bridge when plaintiffs entered and no warning measures taken as to other trains, are probative facts and circumstances sufficient for the jury to weigh and determine whether defendant was guilty of negligence which contributed in whole or in part to plaintiffs' injuries. *Webb* v. *Ill. Central Ry. Co.*, 352 U.S. 512 (1957).

Considering the record as a whole, we believe it contains sufficient evidence to establish a reasonable basis from which the jury might conclude that the defendant was guilty of negligence in failing to give notice, in failing to maintain a proper lookout, and in failing to furnish a safe place to work. Whether or not plaintiffs failed to exercise due care for their own safety is not material to the primary question of whether or not defendant is liable, because contributory negligence is not a defense under the Federal Employers' Liability Act. (*Hall* v. *Chicago & N. W. Ry. Co.*, 5 Ill. 2d 135 (1955).) In our opinion, the court was correct in its determination of the issues to be submited to the jury.

Defendant contends there was serious and prejudicial error committed in the court's instructions to the jury, and specifically complains of a "safe place to work" peremptory instruction, in that it submitted to the jury "the safe place to work theory as an independent ground of negligence." It relies principally on *Starck* v. *Chicago & N. W. Ry. Co.*, 4 Ill. 2d 611, 621 (1955), and *Chicago & N. W. Ry.*

Co. v. *Garwood,* 167 F. 2d 848 (1948). We believe the evidence here is sufficient to bring this case within the "safe place to work" rule. (*McCray* v. *Ill. Central Ry. Co.,* 12 Ill. App. 2d 425, 433 (1957); *Pitrowski* v. *New York Central and St. Louis Ry. Co.,* 4 Ill. 2d 125, 130 (1954). The jury could reasonably have found that the route to the bus, under the conditions portrayed, was not a reasonably safe place to work. "To the maximum extent proper, questions in actions arising under the Act should be left to the jury." (*Bonnier* v. *C. B. & Q. Ry. Co.,* 2 Ill. 2d 606, 611 (1954).) We do not consider it was error to give the peremptory instruction, which included the "safe place to work" charge.

Defendant also complains of an instruction which said that it was the duty of defendant, "at the time and place in question to exercise reasonable care and prudence to provide the plaintiff * * * with a safe place to work and to use reasonable care and caution to keep such place in a reasonably safe condition." It contends that this misstates defendant's duty, which is "to use reasonable care in furnishing its employees with a reasonably safe place to work." (*Anderson* v. *Elgin, J. & E. Ry. Co.,* 227 F. 2d 91, 97 (1955).) If erroneous, we feel there was no prejudicial error, because of an instruction given at defendant's request, as follows: "The defendant was not required under the law to furnish for plaintiff a way by which to leave his respect was to exercise reasonable and ordinary care to place of work which was absolutely safe. Its duty in that respect was to exercise reasonable and ordinary care to provide a reasonably safe way for plaintiff to leave his place of work at the time of the accident in question." We believe this instruction fully pointed out the duty and responsibility of defendant, and that the jury was not misled.

Defendant did not plead any defense of assumption of risk, and contends that the giving of an instruction that

an employee, under the Act, does not assume the risks of his employment was improper, and that "the obvious effect of the instruction was to deprive the defendant of the benefit of the limited defense of plaintiffs' contributory negligence." Defendant's cross-examination of plaintiffs indicates an effort to show that the sole cause of plaintiffs' injuries was the carelessness of the plaintiffs themselves, and that they failed to meet the test of the conduct of reasonable men. We believe this cross-examination shows an attempt to develop an evidentiary basis for use of the defense of the doctrine of assumed risk by changing its name to contributory negligence. "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' * * * 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.'" (*Tiller* v. *Atlantic Coast Line Ry. Co.*, 318 U.S. 54, 58 (1943).) We cannot say, in this case, that the giving of this instruction was error.

Defendant contends that a number of errors were committed which may have affected the amounts of the verdicts. Defendant argues that the instruction on damages permitted the jury to triple, or even quadruple, the allowance for pain, which produces some disability and some inability to work. The instruction sets out the elements of damages the jury could consider as a whole, and each element is qualified "if any is shown by the greater weight of the evidence." We do not believe that the jury was misled by this instruction.

Complaint is also made that in both verdicts the amount is stated only in numerals, and that the verdicts demonstrate "that the jury had little comprehension of the dollar meaning of their verdicts." We have examined the verdicts and believe there is no doubt as to the meaning of the jury in either verdict and what the jury intended to find. (*Western Springs Park District* v. *Lawrence* 343 Ill. 302 (1931).

The trial court denied defendant's motion for a mistrial, because of testimony of plaintiffs' witness Chavez, developed under cross-examination, that defendant's Claim Department had informed him that he need not appear in response to a subpoena received from plaintiffs' attorneys. At defendant's request, the jury was given an instruction that defendant was acting within its rights in advising the witness not to appear in response to the subpoena, which was served on him in Indiana. We have examined the record and find no prejudicial error here.

Defendant complains that the verdicts are grossly excessive, and that the jury obviously failed to give any weight to the contributory negligence of the plaintiffs and, therefore, the verdicts are excessive as a matter of law. Plaintiffs contend, to review the amount of the verdict, we must reweigh the evidence, and where there is an evidentiary basis for the verdict, it is error for an Appellate Court to reweigh the evidence and set aside the jury verdict (*Bowman* v. *Ill. Central Ry. Co.*, 11 Ill. 2d 186 (1957)), and "that the power to review the size of the verdict is likewise so limited" (*Pennell* v. *Baltimore & Ohio Ry. Co.*, 13 Ill. App. 2d 433, 439 (1957); and that it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. *Allendorf* v. *Elgin, J. & E. Ry. Co.*, 8 Ill. 2d 164 (1956).

Defendant contends that if excessiveness of a verdict is reviewable on appeal under state practice, it is reviewable

in a Federal Employers' Liability Act case and cites *Smith* v. *Ill. Central Ry. Co.*, 26 Ill. App. 2d 133 (1960), to show that "the *Pennell* case has been overruled." Because of our conclusion on the question of damages hereinafter given, it is unnecessary for us to discuss either contention.

The evidence as to Gomez shows that at the time of his injury he was 40 years of age, had 7 years of schooling and was in good physical condition; that he had fractures of the middle third of the right femur, of the middle third of the right ulna, and of the right radius, three fractured ribs and a four-inch laceration of the left leg; that the fractures of the femur and ulna were treated by the insertion of medullary pins, later removed, and the fracture of the radius by a plate and screws, which were left in the arm; that the rib fractures healed in good position; that his end result was some stiffness of his knuckle joints, a fifteen degree loss of motion of the right wrist, some contracture of the elbow and thickening and swelling of the right knee and hip, with a fifteen degree loss of flexion at the knee; that further physical therapy "may be expected to reduce, and perhaps in time eliminate the pain" in the right arm and right leg.

There is medical testimony that a condition of pain in the right arm is permanent; loss of movement of the wrist is permanent; loss of strength is permanent; pain in right leg is permanent; inability to walk over a rough road or up and down stairways without difficulty is permanent. There is further testimony that he could no longer do laborious work.

The evidence as to Borrero is that at the time of the occurrence he was 32 years old, in good health and had 3 years' schooling. His injuries consisted of lacerations of the lower lip and of the left parietal region of the scalp, an abrasion of the right forearm, and a contusion and dis-

coloration of the sacral area of the back. The facial lacerations healed, and the abrasion of the left forearm disappeared. The contused area of the back was aspirated several times. He complains of constant pain in the back, and there is medical testimony of painful trigger points in the lumbrosacral area, which meant instability of the sacroiliac ligaments; that it is likely he will remain with an unstable back, and his condition has some degree of permanency. Defendant's doctors, who had treated both plaintiffs and who had examined them, testified that both had good recoveries and were able to return to their regular work as section laborers.

The verdicts do seem liberal, and the medical evidence as to the ability of both to return to manual labor is controversial, but we cannot say, as a matter of law, that the verdicts are excessive. The record is sufficient to furnish the jury with an "evidentiary basis" for both verdicts. We find no reason to depart from the usual rule that the assessment of damages is the pre-eminent function of the jury. *Kahn* v. *James Burton Co.*, 5 Ill. 2d 614 (1955).

Considering all the evidence in this record in the light most favorable to the plaintiffs, we conclude that there was sufficient evidence for the jury to find that defendant's negligence contributed, at least in part, to plaintiffs' injuries, and as we find no reversible error in the trial, the judgments are affirmed.

Affirmed.

KILEY, P.J., and BURMAN, J., CONCUR.

Abstract only.

Judgment Order of Appellate Court of Illinois.

At a Term of the Appellate Court, begun and held at Chicago, on Tuesday, the Sixth day of December, in the year of our Lord, one thousand nine hundred and sixty, within and for the First District of the State of Illinois: Present, The Honorable Roger J. Kiley, Presiding Justice;

" " " Henry L. Burman, Justice;
" " " Arthur J. Murphy, Justice.

Leslie V. Beck, Clerk. Frank G. Sain, Sheriff.

Raphal Borrero and Jose Gonzales Gomez,
Appellees

No. 48136 vs.

Elgin, Joliet & Eastern Railway Company,
Appellant

Error to .....
Appeal from Cook County Circuit Court
No. 58 C 6468

Thursday, December 29, A.D. 1960

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the Record and proceedings aforesaid, nor in the rendition of the judgments aforesaid, is there anything erroneous, vicious, or defective and that in the Record there is no Error. Therefore, it is considered by the Court that the judgments aforesaid, be Affirmed in all things, and stand in Full Force and Effect, notwithstanding the said matters and things therein assigned for Error. And it is further considered by the

Court that the said Appellees recover of and from the said Appellant, their costs, by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Leslie V. Beck, Clerk of the Appellate Court of the First District of the State of Illinois, and keeper of the records, files and seals thereof, Do Hereby Certify, that the foregoing is a true copy of the final order of the said Appellate Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, at
(SEAL) Chicago, this 14th day of August in the year of our Lord one thousand nine hundred and Sixty-One.

LESLIE V. BECK,
Clerk of the Appellate Court
of the First District, Illinois.

Judgment Order of Illinois Supreme Court.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of May in the year of our Lord, one thousand nine hundred and sixty-one, within and for the State of Illinois.

PRESENT: Walter V. Schaefer, Chief Justice

Justice Joseph E. Daily	Justice George W. Bristow
Justice Harry B. Hershey	Justice Ray I. Klingbiel
Justice Byron O. House	Justice Roy J. Solfisburg, Jr.

William G. Clark, Attorney General
Robert G. Miley, Marshal
ATTEST: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 18th day of May, 1961, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Raphal Borrero and Jose Gonzales Gomez, *Respondents*	Petition for Leave to Appeal from Appellate Court, First District. 58 C 6468 48136
No. 36478 vs.	
Elgin, Joliet & Eastern Railway Company, a corporation, *Petitioner*	

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now

fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioner costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this
(SEAL) 23rd day of May, 1961.

MRS. EARLE BENJAMIN SEARCY,
Clerk, Supreme Court of the State of Illinois.

LIBRARY
FILED
SEP 15 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

No. 324

ELGIN, JOLIET & EASTERN RAILWAY COMPANY, a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

FRED LAMBRUSCHI
11 S. LaSalle Street
Chicago 3, Illinois
Attorney for Respondents.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Reasons for Denial of the Writ	2
Statute Involved	3
Additional Statement of the Case	4
Argument	5
I. Under the facts of this case, submission of a "Safe Place to Work" as a ground of liability is squarely within the holding of this Court in *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350	5
II. Where cross-examination shows an attempt to develop an evidentiary basis for the use of the defense of the doctrine of assumed risk, the plaintiffs were entitled to an instruction covering the doctrine and the defendant was not prejudiced, particularly so, when an instruction given at the defendant's request covered the defense of contributory negligence and comparative negligence	8
Appendix	1a
Witnesses for Plaintiffs	
Borrero, Raphal— Cross Examination	1a
Gomez, Jose Gonzales— Cross Examination	3a

PAGE

TABLE OF CASES.

Bailey v. Central Vermont Ry., 319 U.S. 350 ..... 2, 8

Bonnier v. C.B. & Q. R. R. Co., 2 Ill. 2d 606 8

McCray v. I.C. R.R. Co., (1957) 12 Ill. App. 2d 425 5

Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 5

Petrowski v. New York, C. & St. L. Ry. Co., 4 Ill. 2d 125 ..... 6, 8

Potter v. Brittan, (C.A. 3) 286 F. 2d 521 8

Seaboldt v. Pennsylvania R. Co., (C.A. 3) 290 F. 2d 296 8

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 350 .... 2, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1961.

No. 324

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Appellate Court is reported in abstract form as *Borrero* v. *Elgin, J. & E. Ry. Co.*, 28 Ill. App. 2d 362, and in the syllabus form at 171 N.E. 2d 673. The opinion in full is printed as an appendix to the petition for writ of certiorari.

JURISDICTION.

The jurisdictional facts are set forth in the petition for writ of certiorari.

QUESTIONS PRESENTED.

Where the record affirmatively shows that the decision of the court below is in accord with the decisions of that court and this Court further review will not be allowed.

1. Whether to the maximum extent proper, questions rising under the Federal Employer's Liability Act should be left to the jury and where the jury could reasonably find that the route to the bus used by the laborers, under the conditions portrayed, was not a reasonably safe place to work, the trial court was justified in submitting an instruction that included "a reasonably safe place to work" as a ground of liability.

2. Whether cross-examination which tended to show that the plaintiffs below had a conscious knowledge of dangers involved raised a presumption of assumption of risk, rather than contributory negligence, and justified an instruction on the question even though the issue was not raised by the pleadings in the case.

REASONS FOR DENIAL OF THE WRIT.

Respondents in opposition respectfully urge:

1. The decision of the Appellate Court of Illinois is in accord with the prior holdings of the courts of that state and with the holding of this Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350.

2. Where cross-examination shows an attempt to develop an evidentiary basis for use of the defense of the doctrine of assumed risk by changing its name to contributory negligence, the courts will not sacrifice the servant's rights by charging him with assumption of risk under another name. (*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.)

STATUTE INVOLVED.

The only statute involved is the Federal Employer's Liability Act, Title 45, U.S.C., secs. 51, 53 & 54. The pertinent parts are set forth in the petition.

ADDITIONAL STATEMENT OF THE CASE.

Chavez, the acting foreman, testified that he was about a thousand feet behind Valentin, the man in the lead (Abst. 26), and most of the men had not yet reached the bridge (Abst. 26). Julio Cruz was just getting ready to enter the bridge when he saw the train coming. He signaled with his hand, "but the people in the train didn't see me and they kept going. They were inside the train and weren't looking anywhere (Abst. 15)." Cruz signaled while the train still had three quarters of the bridge to traverse (Abst. 16). When he looked into the cab of the engine he couldn't see anyone in the cab (Abst. 16).

Harry Sprinkle, the engineer, testified that he was standing as he approached the bridge (Abst. 74) and he continued standing as he crossed so he could have a better view of the block signal (Abst. 75), that his practice as an engineer was to glance at it practically all the time (Abst. 75). He stated that at the speed he was travelling he could have stopped 300 feet with an emergency application of the brakes (Abst. 77); that when he was 300 feet from the bridge he could see the top part of the bridge and "I could not see whether there was anyone on the bridge unless they were moving (Abst. 78)". He saw no one there that day (Abst. 78), but on the day prior he had seen section laborers working south of the bridge; that "you get used to seeing them around (Abst. 79)." He

testified that an engineer is sometimes notified when there are men working at a certain location and that he was not notified that there were men working south of the bridge on this day (Abst. 82). He also testified that if he were looking forward at all times from the time the train straightened off that curve and went into the mouth of the bridge he could see the men in front of him (Abst. 84); that he was looking straight ahead, not up, but saw nobody (Abst. 84).

ARGUMENT.

I.

UNDER THE FACTS OF THIS CASE, SUBMISSION OF A "SAFE PLACE TO WORK" AS A GROUND OF LIABILITY IS SQUARELY WITHIN THE HOLDING OF THIS COURT IN BAILEY V. CENTRAL VERMONT RY., 319 U.S. 350, AND SUBSEQUENT DECISIONS.

We submit the petitioner has whooly misinterpreted *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325. That case was tried on the question of furnishing a wrench which was not suitable for the work to be done and the plaintiff sought to make the defective wrench the basis of a charge or failure to provide a safe place to work, arguing that the conditions under which he had to work increased the hazard from the use of the defective wrench. This Court correctly rejected that contention.

The safe place to work concept also includes safe ingress and egress to and from the place of work. See: *McCray* v. *I.C.R.R. Co.*, (1957) 12 Ill. App. 2d 425. The defendant in this case sent men to work in a location which demanded at least the ordinary amount of care on its part. The crew members could not expect this non-scheduled train to appear without signaling or warning of any kind. The engineer testified that at times it was a practice that the engineer be notified that there were men working on the track (Abst. 82). He further testified that at times the railroad would station men at certain spots to warn the men of an approaching locomotive when they are laying rails and "*it is a dangerous place* and visibility is bad, to the locomotive engineer and to the men that are working on the tracks." (Abst. 83) These conditions cer-

tainly existed at the time of this accident and yet no precautions of any kind were taken for the safety of the men.

The matter was in issue in *Pitrowski* v. *N.Y.C. and St. L. R.R. Co.*, 4 Ill. 2d 125, 129-130, where the court said that only where there is complete absence of probative facts tending to show negligence should the court take the case from the jury and decided the issue of negligence as a matter of law. On the issue of a safe place to work the court stated:

> "Likewise, the question of whether defendant was negligent in not taking additional measures to furnish its employees with a safe place to work was a question of fact for the jury. The Appellate Court had no right to hold, as a matter of law, that defendant was under no duty to inspect before this switching operation was commenced. The jury was properly entitled to find, as it apparently did, that it was negligent for defendant to conduct the switching in an unlighted yard without first inspecting to ascertain whether the track was clear of dangerous obstacles. In *Williams* v. *Atlantic Coast Line Railroad Co.*, (5th Cir.) 190 F. 2d 744, the court said: 'The employer must make proper tests and inspections to discover dangers in the places where the employees must work, and after ascertaining their existence must take reasonable precautions for the safety of the employees.' Whether defendant made proper tests and inspections in the instant case was a proper question for submission to the jury and this it was error for the Appellate Court to reverse the verdict and judgment in favor of plaintiff."

The train certainly constituted a danger to men on the bridge and the jury could, and did, under all the facts, find that the railroad failed to take "reasonable precautions for the safety of its employees."

Certainly, in a case such as this, where the railroad had men working in the area of the bridge and was running non-scheduled trains and then took no care or precaution for men it knew were working in the area, it cannot say the "safe place to work" doctrine has no application.

The evidence shows the men, plaintiffs included, were walking toward the bus under order of Chavez. The two men ahead of plaintiffs were only 20 feet from the mouth of the bridge and, having a view of the curve, were able to see the train in time. Plaintiffs were 60 feet or more back of them (Abst. 19, 27, 62); they were carrying tools; the footing was poor (Abst. 38, 62) (Addt'l. Abst. 9) causing them to have to be "looking up and looking down." The acting foreman, Chavez, who should have been at the forefront of the group to warn them or put them on notice, was, instead, bringing up the rear. He was more concerned with any tools that might be dropped or his own safety (Abst. 22) than with the safety of the men. Chavez, as acting foreman, saw the train coming from the other direction (Abst. 22). He then gave the "vamos" order. It was clearly his duty, as acting foreman, to warn the men of the perils of the situation. No warning was given; no precautions were taken; the plaintiffs did not have a "safe place to work".

Under these facts, the place to work was rightfully in issue. Because of the nature of a track laborer's work it is obvious that they must work on and cross bridges. Other than the tracks themselves, there was no walkway for the workers. The facts are such as to bring the case squarely within the holding of the Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350.

The court below, in its opinion correctly followed the decisions of the Illinois Supreme Court as set forth in

Pitrowski v. *New York, C. & St. L. Ry. Co.*, 4 Ill. 2d 125, and *Bonnier* v. *C. B. & Q. R.R. Co.*, 2 Ill. 2d 606. The Illinois courts, since the enunciation of the principles applicable, have consistently followed the holding of this Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350. The true expression of the concept, as set forth in the *Bailey* case, is that the employer has a duty to use reasonable care in furnishing his employees with a safe place to work and it is a duty which becomes more imperative as the risk increases; it is a continuing duty from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

We submit that petitioner seeks, not to prevent an erosion of the *Michalic* case, but to erode the holding in *Bailey*.

II.

WHERE CROSS-EXAMINATION SHOWS AN ATTEMPT TO DEVELOP AN EVIDENTIARY BASIS FOR THE USE OF THE DEFENSE OF THE DOCTRINE OF ASSUMED RISK, THE PLAINTIFFS WERE ENTITLED TO AN INSTRUCTION COVERING THE DOCTRINE, AND THE DEFENDANT WAS NOT PREJUDICED, PARTICULARLY SO, WHEN AN INSTRUCTION GIVEN AT THE DEFENDANT'S REQUEST COVERED THE DEFENSE OF CONTRIBUTORY NEGLIGENCE AND COMPARATIVE NEGLIGENCE.

Petitioner's brief (P. 16), relies heavily on the opinion of Goodrich, *J.*, in *Potter* v. *Brittan*, (C.A. 3), 286 F. 2d 521, and *Seaboldt* v. *Pennsylvania R. Co.*, (C.A. 3) 290 F. 2d 296. However, it is worthy of note that the learned jurist, quoting leading text writers, defined assumption of risk as action taken with a conscious knowledge of the danger faced with a resulting negation of the defendant's duty. For the convenience of the Court, respondents have

reproduced defendant's cross-examination of the plaintiffs in their appendix to this brief. While it is possible to say that the questions were designed to show contributory negligence, the overwhelming trend of the questioning was obviously of such a nature as to attempt to show that the plaintiffs *knew* the dangers they faced.

The Illinois Appellate Court had this cross-examination before it in an additional abstract of record filed by plaintiffs in that court and we are certain the Appellate Court composed, as petitioner states, of experienced jurists, did not err in appreciation of the distinction between "assumption of risk" and "the carelessness of the plaintiffs themselves".

The holding in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, held that the defense of assumption of risk, by whatever name it was called, had been swept into the discard. This is most certainly true. Nevertheless, the fact remains that defendants are constantly seeking ways and means of removing the doctrine from the dustbin. The *Tiller* case enunciates a clear principle, well known in the law. Assumption of risk, prior to the amendment and the *Tiller* case, was such a good defense it is difficult for defendants in FELA cases to relinquish. The courts, and rightly so, are constantly being required to strike the defense which is raised under one guise or another and mainly, as here, as that of "non-negligence". The defendant's cross-examination clearly showed an attempt to bring out an awareness of the perils faced; it was clearly questioning designed to show a conscious awareness of danger.

Further, and most important, the instruction did not deprive the defendant of its partial defense of plaintiffs'

contributory negligence and the principle of comparative negligence. Instruction No. 12 (Abst. 115), given at plaintiff's request, recognized defendant's right to the defense and stated that any negligence on part of the plaintiffs, while it would not bar a recovery, would entitle the defendant to a proportionate reduction of damages.

Most important of all, the defendant also covered the point in instruction No. 6, given at its request. This instruction is as follows:

> "You are instructed that it was the duty of the plaintiffs in this case at the time and place of the accident in question to exercise ordinary and reasonable care for their own safety and protection, and if you believe from the evidence that they failed to exercise such care, and you further believe from the evidence that such failure on their part to exercise ordinary and reasonable care for their own safety was the sole cause of the accident resulting in their injuries, then you are instructed that such plaintiffs are not entitled to recover in this case. If you believe from the evidence that any such failure on their part to exercise ordinary and reasonable care for their own safety contributed with the negligence of the defendant to cause the injury of which they complain and the damages which they claim to have sustained, then you are instructed that such plaintiffs are not entitled to recover the full amount of the damages sustained by them but the damages shall be diminished in proportion to the amount of negligence attributable to them."

Had there been a failure to instruct the jury on the effect of plaintiffs' own negligence there might be merit in its contentions. However, the jury was fully and carefully instructed. In view of the tenor of the cross-examination, we submit that it would have been error to refuse the instruction on assumption of risk. Failure to give

the instruction would most certainly have raised the doctrine of "assumption of risk" under the name of "non-negligence" on part of the defendant.

Respondents respectfully submit that the questions presented by the petitioner were carefully and correctly considered by the courts below and that the decision is in full accord with the prior holdings of this Court.

Respectfully submitted,

FRED LAMBRUSCHI,
Attorney for Respondents.

APPENDIX.

WITNESSES

189 RALPH BORRERO, a plaintiff herein, called as a witness on his own behalf, having been previously duly sworn, testified further through an interpreter as follows:

Cross Examination by Mr. Hackbert.

Q. Mr. Borrero, you don't know whether or not you had ever worked at this particular location before this day of the accident, is that right?

A. Well, I don't think—I can't remember.

Q. When you came to that place that morning to start work, which side of the bridge did you walk up, the north end of the bridge or the south end of the bridge?

A. Well, on the northwest side.

Q. You were working out there at the place almost eight hours that day, weren't you?

190 A. Yes.

Q. And while you were working there, that day, there were trains operating over the railroad tracks going in both directions, weren't there?

A. I do not understand that question well.

Q. While you were working there, that day, did trains go over those tracks?

A. Yes.

Q. And some of the trains were going toward Kirk Yard and some of the trains were coming away from Kirk Yard, weren't they?

A. Yes.

Q. There were two railroad tracks side by side at the place where you were working, weren't there?

A. Yes.

Q. Sometimes the train would be on one of the tracks and at other times other trains would be operating on other tracks, is that right?

A. Would you repeat that question, please?

(The question was repeated by the interpreter.)

The Witness: A. You mean while I was working?

Mr. Hackbert: Q. Yes.

The Witness: A. Yes.

191 Q. You'd been working as a track laborer for about a year?

A. Well, I was working there for about ten months.

Q. And you knew, when you were working on the railroad tracks, that a train might come along any time, didn't you?

A. I did not.

Q. You'd seen trains operating over those tracks that day, hadn't you?

Mr. Lambruschi: I object, your Honor, he already answered the question.

The Court: Cross Examination. Objection overruled. Have you finished your question?

Mr. Hackbert: Yes.

Repeat the question, please.

(The record was read as requested.)

The Witness: A. Yes, but we were work.

Mr. Hackbert: Q. And as you started to cross the bridge, on your way back to the bus, there was one train then on the bridge, wasn't there?

The Witness: A. No, one was leaving the bridge.

283 *Cross Examination of Jose Gonzales Gomez. by Mr. Hackbert.*

Q. After you started working for the E.J. & E. on April 16, 1957, did you work steadily up until the time of this accident on November 19, 1957?

A. Yes.

Q. Was your work for the E.J. & E. all along the main line tracks, or sometimes did you work with your crew in Kirk Yard?

A. Well, I know that I use—we use to work in every place pertaining to Kirk Yard. Now I don't know what you mean when you say that is some place else, meaning that is the main tracks.

Q. Had you worked out along the tracks where the trains operated before this particular time?

A. Yes.

Q. And you worked out in the country on the railroad tracks, did you?

284 A. Yes, in the country. Well, I used to work wherever they sent me.

Q. Sometimes it would be on the tracks in the yard and sometimes out on the main tracks where the trains were?

A. Well, the thing is that they use to take—they used to transport us by bus, and we went to work, you know, here and there, wherever they sent us. Well, what do you mean by working in the Kirk Yard or working in other places on the main lines of the track?

Q. Well, let's see if I can explain it.

In Kirk Yard there are many railroad tracks side by side, aren't there?

A. Yes.

Q. And on those tracks they move the cars back and forth and switch them around, don't they?

A. Yes.

Q. And out on the main line tracks they operate the trains with an engine at the head end and the cars and a caboose at the rear end of the train?

A. Well, which one is the main line that you are referring to?

Q. The tracks that you were working on on—

285 Mr. Lambruschi: Let him explain. He said something here. Pardon me. What did he say?

The Witness: Well, there are many tracks there. I don't know which one is the main line.

Mr. Hackbert: Q. Well, the main line is—Strike that out.

The tracks on which you were working that day you were hurt are main line tracks.

The Witness: A. Well, are you telling me that is a main line, because I don't know if it is or not.

Q. Yes. I am telling you.

Now, have you worked out along those tracks at other times during the eight months or so that you worked for the railroad?

A. What do you mean? Just a minute. When do you mean? When did I work on those lines?

Q. Any time from April to November, 1957.

A. Yes, sir.

Q. When you were working out on those tracks you saw trains moving over both sets of tracks, didn't you?

A. Well, when we were fixing the tracks, I do not remember.

286 Q. When the trains would come along, when you were fixing the tracks, you'd get off the tracks and

stand off to the side until the train went by, wouldn't you?

A. Well, if we were working both tracks and one train was coming on this track, when—they used to move to the other track and let the train pass, and the people that were working on the other track kept working.

Q. When there were trains moving on both tracks you'd get off the tracks to the side?

A. Well, I never saw two trains passing at the same time.

Q. You knew that one set of tracks was used for the trains going toward Gary and the other set of tracks was used for trains going away from Gary?

A. What do you mean, the tracks where we were working, or the tracks that were under where we were working?

Q. The tracks where they were working.

A. Well, I know that one of the tracks, I know that the trains go toward the place where we have our office; but the other one, I don't know if the trains are going to Gary, I don't know if they go to Gary.

287 Q. As you were working out there near this bridge where the accident occurred, you'd been there three or four days before the accident?

The Interpreter: Repeat that.

Mr. Hackbert: Strike that out.

Q. Had you been working near this bridge for two or three or four days before the day you were hurt?

The Witness: A. Yes.

Q. And while you were working there, those three

or four days, trains came by, some going one way and some going the other way, didn't they?

A. That I do not remember well.

Q. Did you pay any attention to the trains as they came along those tracks while you were working there?

A. You mean where I was working?

Q. Yes.

A. Well, when I was working, there was a train coming, I wasn't paying attention, because the foreman was the one that was taking care of that.

Q. How would you learn when a train was coming?

A. When?

288 Q. When you were working along the tracks near this bridge?

A. Well, if by any chance there was a train coming then Pedro is the one that used to give us the warning, because they use to give us a warning on the tracks.

The Court: "Used to clear the tracks," I think he said.

The Interpreter: I beg your pardon?

The Court: The last part, "gave us a warning, used to do that to clear the tracks," I think he said.

The Interpreter: No, I didn't say that. I am going to ask the question again.

The Court: It isn't important.

The Interpreter: Would you repeat the question.

(The record was read as requested.)

The Witness: A. Well, sometimes the train whistled, if not then Pedro, that was in charge, was the one to give us the warning that the train was

coming. I do not remember in any occasion that a train was passing while we were working.

Mr. Hackbert: Q. In all of the eight months that you worked for the railroad did trains pass the place where you were working?

289 The Witness: A. Yes, sir.

Q. And sometimes the train would whistle and sometimes some one in the crew would call out that a train was coming, is that correct?

Mr. Lambruschi: I object to the form of the question. Number one, it's repetitious. Number two, he said not the crew, but he said the foreman was the one who was in charge of giving the orders.

The Court: He is a member of the crew. He said some member.

Mr. Lambruschi: He just repeated the same thing. We have been going over that.

The Court: Let him answer that. Objection overruled.

Mr. Hackbert: Would you read the question.

(The record was read as requested.)

The Witness: A. That is right. Sometimes the train will whistle and sometimes they use to give us the warning that a train was coming.

Q. Now, when you started out on the bridge on your way to the bus this afternoon of November 19, 1957, there was one train already passing over the bridge, wasn't there?

A. Well, there was a train passing the bridge,
290 but it was almost leaving the bridge.

Q. But it was still on the bridge at the time you went out on the bridge?

A. It was leaving the side where I was entering the bridge.

Q. And was that train moving faster than you were walking, or was it moving slower than you were walking?

A. Well, it is a natural thing that the train was going faster than me.

Q. How much faster was the train going than you were walking?

A. Well, I think that the train—maybe the train was going about 30 or 35 miles, but I don't know.

Q. There were two men in your crew who went on the bridge ahead of you?

A. Yes.

Q. And they were about 60 or 70 feet ahead of you, were they?

A. More or less. That is what they told me that they were at that distance; but I am not sure of it.

Q. Were you watching those men as you were walking across the bridge?

A. When I was walking on the bridge I was look-
291 ing up and down.

Q. When you looked up would you see those two men who were ahead of you on the bridge?

A. Well, sometimes I saw them and sometimes I did not see them, because that was a real fast, because I had to look back down again, because it was danger underneath.

Q. You would just look up very quickly and then look down again?

A. Well, I was looking more down than up, because I was watching—I was watching the floor.

Q. Did you hear either one of those men call out a warning that a train was coming?

A. No.

Q. Did you see either one of those men or anyone else on the bridge get out of the way of the train?

A. No.

Q. Did you see the train that hit you at any time.

A. No.

Q. Were you ahead of Borrero or behind him?

A. I was in front of him.

Q. Did you see Borrero hit by the train?

292 A. Well, he was behind me and the train hit me first.

Q. Were you going across the bridge at the same rate of speed as the men who were ahead of you?

A. Well, I was walking with a natural step, being careful not to fall down.

Q. As you went across the bridge, did you stay about the same distance behind those two men as you were when you started on the bridge?

A. Well, I know that they were ahead of me, but I can not tell you the distance when I entered the bridge, because I don't know. I tell you about the distance when I was already on the bridge, because they told me about the distance.

Q. Were you paying any attention to those men who were ahead of you?

A. I was paying attention—Well, the two men that were in front of me—I was paying attention to what I was doing, because I was walking, and I was looking, at the same time, up and down.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 324

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

HARLAN L. HACKBERT,
208 S. LaSalle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

Chicago Law Printing Corp., 189 W. Madison, Chicago 2, FRanklin 2-6521

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 324

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully petitions for a rehearing of the order of October 23, 1961, denying certiorari in the above entitled cause.

Petitioner limits its motion for reconsideration of the denial of its petition for writ of certiorari to the second question presented by the petition—the error in setting up

the straw man of assumption of risk to becloud the basic issue of comparative negligence. Upon that issue we respectfully direct the attention of this Court to the decision of the Supreme Court of Utah in *Siciliano* v. *Denver & R. G. W. Co.*, 364 P. 2d 413, published in the advance sheet of September 29, 1961, after the petition and opposing brief in this case had been filed.

In *Siciliano* as here, it appears that "defendant urges that the court erred in giving an objected to instruction that plaintiff did not assume any risk in his employment" (364 P. 2d at 414). The Supreme Court of Utah held (364 P. 2d at 414):

> "As to the contention that it was prejudicial error to instruct the jury as to assumption of risk, we agree. No issue was raised by defendant's pleading on that score, and there was no evidence that remotely could have suggested that assuming the risk would have prevented recovery here. Nor would have been proper an instruction on assumption of risk had this been a case divorced from the F.E.L.A. (which specifically eliminates such defense), since the evidence showed conclusively that Siciliano had no knowledge of any hazard, such knowledge being a necessary factor before assumption of risk can be urged as a defense."

The court referred to its earlier decisions in *Bruner* v. *McCarthy*, 105 Utah 399, 142 P. 2d 649, and *Moore* v. *Denver & R. G. W. R. Co.*, 4 Utah 2d 255, 292 P. 2d 849, 852, disapproving such an instruction, and to *Ellis* v. *Union Pacific R. Co.*, 148 Neb. 515, 27 N.W. 2d 921, and continued (364 P. 2d at 415):

> "The coup that seems to have led to the disapproval of the instruction in F.E.L.A. cases, was executed by Mr. Justice Frankfurter in his concurrence in *Tiller* v. *Atlantic Coast Line R. Co.*, (318 U.S. 54, 63 S. Ct. 444, 453, 87 L. Ed. 610) when he said:

> '"Assumption of risk" as a defense where there is negligence has been written out of the act. But "assumption of risk", in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase "assumption of risk" is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore de discarded.'
>
> "This language was referred to and applied in *Texas & Pac. Ry. Co.* v. *Buckles.* (5 Cir., 232 F. 2d 257)
>
> "In order to serve as a guide for instructions on assumption of risk in F.E.L.A. cases, we state that in the usual case it is prejudicial error to instruct that under the act the employee does not assume the risks of his employment occasioned by the employer's negligence, unless, as Mr. Justice McDonough pointed out in the *Moore* case, such issue was raised by the pleadings and evidence,—and we might add unless raised by the pleadings *or* evidence. There may be a case where the issue was not pleaded but where the evidence so emphasizes the fact that the employee recklessly and foolishly took on a known and dangerous hazard as to 'create improper inferences' that should be 'dispelled' by a cautionary instruction, as reflected in the language of Mr. Justice McDonough."

The decision of the Appellate Court of Illinois here is squarely in conflict with these decisions of the Supreme Courts of Utah and Nebraska, and with the very recent decision of the Court of Appeals for the Third Circuit in *Seaboldt* v. *Pennsylvania R. Co.* (C. A. 3), 290 F. 2d 296, cited at p. 17 of the petition. The "reasoning" by which the court below sought to sustain the challenged instruction is squarely in conflict with the considered statement of the

Court of Appeals for the Second Circuit in *Murray* v. *New York, N. H. & H. R. Co.* (C. A. 2), 255 F. 2d 42, at 44, that:

> "The trial judge was apparently of the view that the rule tended only to show assumption of risk by the plaintiff, a defense which does not exist under the Act, 45 U.S.C.A. § 54. To some extent the doctrines of assumption of risk and contributory negligence overlap. See *Pacheco* v. *New York, N. H. & H. R. Co.*, 2 Cir., 1926, 15 F. 2d 467. The former 'refers to the situation in which the plaintiff, with full knowledge of the risk, enters into some relation with the defendant involving danger to himself through the defendant's conduct.' Prosser on Torts 377 (1941). Contributory negligence, on the other hand, consists of 'conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection * * *' Restatement of Torts § 463. As we have indicated above, we think that violation of Rule 745 by the plaintiff was some evidence from which the jury might determine that plaintiff was not in the exercise of due care in being aboard the engine. *The defendant may not be denied its partial defense of contributory negligence merely because the same evidence would be pertinent to prove assumption of risk.*" (Emphasis ours)

See also *Potter* v. *Brittan* (C. A. 3), 286 F. 2d 621.

The conflict between the decisions of state and federal courts sitting in Illinois and the decisions above referred to in other states and other circuits will not die down by being ignored. The instruction was challenged in three cases within eight months. Railroad defendants are keenly conscious of the fact that this instruction — this "hazardous legal tool," to quote Mr. Justice Frankfurter—is used to cut down their "partial defense of contributory negligence," as Judge Waterman puts it. Sooner or later this Court must face the question necessarily presented by this appeal: Does an instruction on assumption of risk have any place at all in an F.E.L.A. case. This Court has held

that "cases tried under the Federal Act [are] to be handled as though no doctrine of assumption of risk had ever existed" (*Tiller, supra*, p. 64). The jury, in its relatively simple duty "to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned" (*Tiller, supra*, p. 65) should not be confused by the difficult concept of "assumption of risk."

The case at bar necessarily and squarely presents for decision the conflict which must inevitably be decided by this Court. We respectfully submit that the continuing conflict, presented by the three decisions in a space of eight months, should be resolved now.

Respectfully submitted,

HARLAN L. HACKBERT,

Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

HARLAN L. HACKBERT,

Counsel for Petitioner.